



IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. **78-108**

LINDA CHAPMAN, ADMINISTRATOR OF THE ESTATE OF
MURREL CHAPMAN, DECEASED,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS (IN BANC)
FOR THE SEVENTH CIRCUIT.**

LEONARD R. GRAZIAN,
120 West Madison Street,
Chicago, Illinois 60602,
(312) 332-0664,
Counsel for Petitioner.

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The Petitioner, Linda Chapman, respectfully prays that a Certiorari issue to review the Judgment and Opinion (decided In Banc) and entered in this proceeding on May 1, 1978 and modified on Court's own Motion on June 9, 1978.

OPINIONS BELOW.

The Opinion of the Court of Appeals decided In Banc is not yet reported and appears in the Appendix (Appendix A1-A11). The revised Opinion of the Panel of the Court of Appeals is not yet reported and appears in the Appendix (Appendix A12-A21). The original Opinion of the Court of Appeals is

cited as *Chapman, Administrator v. United States*, 541 Fed. 2d 641 and appears in the Appendix (Appendix A22-A30). The Opinion rendered in the District Court for the Northern District of Illinois has not been published and appears in the Appendix (Appendix A31-A35).

JURISDICTION.

Judgment of the Panel of the Court of Appeals was entered on August 20, 1976. In response to Petition for Rehearing, the revised Opinion of the Panel of the Court of Appeals was entered on June 3, 1977. A Petition for Rehearing In Banc was allowed and the In Banc Opinion of the Court of Appeals was entered on May 1, 1978 (and modified on Court's own Motion on June 8, 1978). This Petition for Certiorari was filed within ninety (90) days of May 1, 1978. This Court's jurisdiction is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Whether Federal Admiralty Jurisdiction no longer extends to an accident involving small "pleasure craft" when it occurs on water that although navigable and used for commercial transportation in the past, is now being used for only recreational purposes.
2. Whether recreational boating accidents no longer give rise to a claim within the Admiralty Jurisdiction when it occurs on waters that although navigable for purposes of the Congress Power under the Commerce Clause, are not used for commercial navigation in the present state.
3. Whether the Federal Government through administrative action can unilaterally abandon its supervision over dangerous objects which were placed in a waterway while these waters were commercial and under Federal control, and not be subject to Admiralty Jurisdiction.

STATUTE INVOLVED.

The pertinent provisions of the Suits in Admiralty Act (46 U. S. C. § 741 *et seq.*) are: "In cases where if . . . a private person or property were involved, a proceeding in Admiralty could be maintained, any appropriate non-jury proceeding in personam may be brought against the United States . . ." 46 U. S. C. 742.

STATEMENT OF THE CASE.

In April of 1972, Murrel Chapman, the husband of Linda Chapman, lost his life when the small boat in which he was fishing was swept over the remains of a certain abandoned, submerged, unmarked dam which existed under the waters of the Kankakee River at Wilmington, Illinois. She brought an action for damages under the provisions of the Suits in Admiralty Act (46 U. S. C. A. 741 etc.)¹ (A2, A12, A13, A14, A22, A23, A24).

In essence, she contended in her action against the Government that this particular dam was on a navigable waterway of the United States; was dangerous and a menace to navigation; further that the Federal Government negligently and wrongfully permitted said dam to exist without placing any markings or warnings of the danger to boaters; that the Government's negligence was a proximate cause of her husband's fatal injuries and that she was damaged thereby (Appendix A13, A14, A23, A24).

The Government denied that the Kankakee River was a navigable stream, except for that portion of the Kankakee commencing at its mouth (the junction of the Kankakee, Illinois and Des Plaines Rivers) upstream to a point 5.5 miles South

1. An alternative count brought under the Federal Torts Claims Act, 28 USC Par. 2671 etc. was dismissed by the District Court on a finding of contributory negligence.

therefrom.² Further, that there was no Admiralty Jurisdiction; also that the Government did not own or maintain the dam and had no duty to mark the dam or to warn fisherman of its presence (Appendix A13, A14, A23, A24).

A. Description and History of the Kankakee River.

The Kankakee River commences in the State of Indiana, and crosses into the State of Illinois, flowing in a Northwesterly direction; it finally empties into the Illinois Waterway at its junction or confluence with the Illinois and Des Plaines Rivers. The Kankakee River itself has two tributaries; the Iroquois River and the Yellow River; it is 159 miles long; its water shed is 5,270 square miles; its average discharge into the Illinois Waterway is 5100 cubic feet per second; it is four times as large as the Des Plaines River and has four times the navigable capacity of the Des Plaines River which previously had been determined as navigable by Court decision *Economy Light and Power Company v. United States*, 256 U. S. 113 (1921). At one time the Kankakee River was used with regularity by commercial vessels, but the last commercial activity was recorded on same in 1931, when the last steamers abandoned their schedules on the Kankakee. However, even as of that date, a small side wheel steamer was still operating (Appendix A15, A17).

B. The Dam in Question.

Sometime in approximately 1847, a large dam 984 feet long was constructed across the main (west) channel of the Kankakee River at Wilmington, Illinois. The dam was built as an aid to increasing slack water navigation through the East fork of the river which ran through the town of Wilmington and also toward raising the water level of the Illinois and Michigan Canal. After its construction, commercial activity flourished on the

2. The fatal accident occurred approximately three miles further South of that point.

river for many years. However, by the turn of the century, this dam had fallen into disuse. Thereafter, it had been rebuilt from time to time but finally was abandoned after the Federal Government declared the river non-navigable in 1932; it served no purpose whatsoever in the last thirty years, deteriorating into an underwater hazard which was practically invisible upstream of the dam. The Government had knowledge of this dam for at least fifty years prior to the occurrence in question. The dam was never owned or maintained by the United States (Appendix A13, A14, A15).

C. The Federal Government's Actions Concerning the Kankakee River.

In 1822 Congress granted land to the State of Illinois to raise funds and establish the right of way of the Illinois and Michigan Canal³ (A3, A13, A14, A15, A19).

The Government exercised a continued involvement in the Kankakee until 1932. The Congress of the United States authorized monies for study and improvements to the River; monies were appropriated for flood protection, the Federal share to be based upon the "value of protection to navigation;". The construction of several bridges were authorized "suitable to the interests of navigation." (Appendix A4, A15, A19, A25).

As late as 1931 the Corp of Engineers authorized permits for wires, submarine cables, etc., showing its supervision over the Kankakee River. In 1924, when a Bill was initiated in the Congress of the United States to declare that portion of the Kankakee River (at Wilmington) non-navigable, the Government through the Secretary of War vigorously opposed the legislation advising the Congress in part that the enactment of the

3. The State started construction of the Canal in 1836; however the project was bungled by the State; in 1847, a private company in order to improve slack water navigation into the Illinois and Michigan Canal and raise its water level, built four dams, one of which was the dam in question (A14, A15, A19).

proposed Bill would remove this section of the River from the "usual Federal supervision." In 1932 the Corp of Engineers, by administrative order on its own volition, declared the river to be non-navigable and abandoned its supervision of the River from that time. After the Federal Government had abandoned supervision, from time to time, the Wilmington Rotary Club, recognizing the danger that existed, attempted to string barrels across the river, but at the time of the occurrence, had not been able to do so and no barrels were strung across the river (Appendix A4, A15, A19, A25).

D. The Fatal Accident.

On the day of the occurrence, the decedent and his sister-in-law were fishing on the Kankakee River from the decedent's small boat; the vessel being a 16 foot aluminum boat equipped with an outboard motor. As they drifted to a point about twenty feet North of the submerged crest of the dam, they were alerted to danger by men who were shouting from the bank of the river. Though the decedent feverishly tried to start the motor boat again, the boat went over the submerged crest of the dam. Chapman's body was recovered a week later. There were no warning signs upstream of the dam, nor was the dam marked in anyway (Appendix A2, A13, A23).

REASONS FOR GRANTING THE WRIT.

I.

The scope of Federal Admiralty Jurisdiction over pleasure boating activity should be reviewed by this Court.

II.

The decision below conflicts with the decisions of other Courts of Appeals as to the scope of Federal Admiralty Jurisdiction.

III.

The rule enunciated by the Court below is a departure from previously recognized Rules of Federal Admiralty Jurisdiction and works an unduly harsh result on the Petitioner.

I and II.

The decision of the Court below is a departure from previously accepted law. For approximately 100 years the Courts have consistently held that jurisdiction of the United States under the Admiralty Act is determined by whether a water way is capable of being used for the purposes of commerce. *The Montello*, 87 U. S. 430, 441 (1874); *Economy Light and Power Company v. United States*, 256 U. S. 113 (1921).

However, in more recent years, with the phenomenal rise in the ownership and use of small pleasure craft in the United States, there has been a growing tendency to include an additional requirement for the granting of Admiralty jurisdiction, to-wit: That there should be a "commercial activity" requirement as well (*i.e.* some relationship between the Tort and traditional forms of maritime commerce and navigation). This court has never acted on the subject of Admiralty jurisdiction over pleasure craft accidents, but in *Executive Jet Aviation Company, Inc. v. City of Cleveland, et al.*, 409 U. S. 249 (1972) this Court ruled that Admiralty jurisdiction did not extend to an aviation tort claim as there was no significant relationship to traditional maritime activity. In the Opinion below, the same rationale was extended to the pleasure boat mishap which was the subject matter of Petitioner's lawsuit, wherein the Court stated, "The same can be said of a claim arising out of a pleasure boat accident in waters used exclusively for recreational activities." (A6). It is respectfully suggested that this is an unwarranted extension of the Executive Jet Rule.

This Court and the Courts of other Circuits have assumed that operation of pleasure boats fell within Admiralty Jurisdiction. See *Lane v. U. S.*, 529 Fed. 2d 175 (4th Cir. 1975).⁴ *Richards v. Blake Builders Supply, Inc.*, 528 Fed. 2d 745 (4th Cir. 1975);⁵ *St. Hilaire Moye v. Henderson*, 496 Fed. 2d 973 (8th Cir.) *cert. denied* 419 U. S. 884 (1974); *Kelly v. Smith*, 485 Fed. 2d 520 (5th Cir. 1973); *Levinson v. Deupree*, 345 U. S. 648 (1953); *Just v. Chambers*, 312 U. S. 383 (1941); *Coryell v. Phipps*, 317 U. S. 406 (1943). The Opinion below further makes the fine distinction that unless the River, though navigable is not used for commercial maritime activity, then in the absence of said commercial activity the Federal Court should not invoke Admiralty Jurisdiction. With the application of this additional distinction to the Rules, it appears that we would develop a further lack of uniformity involving pleasure boating accidents on navigable waters. Jurisdiction would be extended to a pleasure boating accident on a commercially active navigable waterway, yet an identical pleasure boating accident on a non-commercial but navigable waterway would not be given the uniform benefit of Federal Admiralty Jurisdiction. "Upholding Admiralty Jurisdiction (*i.e.* re: pleasure craft activity) does not stretch or distort long evolved principles of maritime law. Admiralty has traditionally been concerned with furnishing remedies for those injured while traveling navigable waters . . . the Admiralty Jurisdiction of Federal Courts stems from the important national interest in uniformity of law and remedies for those facing the hazards of water borne transportation". *Kelly v. Smith, supra*, at 526.

It is respectfully suggested that this Court resolve the conflicts and review the scope of the Federal Admiralty Jurisdiction over pleasure boating activity.

4. Also please note that the unmarked underwater hazard therein existed in an old river channel that was used only by pleasure craft.

5. Also please note that "man made" Lake Gaston did not support commercial activity (P. 747).

III.

Assume "arguendo" that Federal Admiralty Jurisdiction would not extend to a pleasure craft accident on waters which though "navigable" for the purposes of Congress' power under the commerce clause when said waters were not in fact used for commercial navigation and were not susceptible of such use in their present state. Would not the *unique* factual situation presented in this case cause it to be an exception to the foregoing rule of law?

This distinction or exception was made clear in the opinions of the distinguished panel below sitting by special designation.⁶

The late Justice Tom Clark in these Opinions carefully pointed out, "This aspect of the case—recognition by Congress of the Kankakee as navigable water—when coupled with the history of federal involvement whether by land grants or approval of construction permits is the death blow to the Government's case . . . here the United States was a procuring cause of the dam being constructed and has let it become submerged under the surface water, becoming a hazard to the safety of all who approach it. As late as 1932, the United States has evidenced a continuing right of supervision over the Kankakee, at which point in time it claimed by means of an inter-office memorandum that it could escape all further responsibility. The United States has *ex parte*, renounced the supervision it had claimed for a century and has not only permitted the dam to deteriorate into a number one water hazard but has not even placed warning signs to alert the public to the dangers that it has helped to create. This seems to us both untenable and unseemly. As we have been granted Admiralty Jurisdiction over maritime activity, it is imperative that the jurisdiction be exercised here" (A20, A30).

6. The late Associate Justice Tom C. Clark (ret.), United States Supreme Court Latham Castle, Senior Circuit Judge; William C. Campbell, Senior District Judge U. S. District Court for the Northern District of Illinois.

The Petitioner would be harshly dealt with if the Government were allowed to gain a jurisdictional shield through its wrongful action of withdrawing its supervision over the river in question (A9, A10).

CONCLUSION.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

LEONARD R. GRAZIAN,
120 West Madison Street,
Chicago, Illinois 60602,
(312) 332-0664,
Counsel for Petitioner.

APPENDIX.

IN THE UNITED STATES COURT OF APPEALS For the Seventh Circuit

Nos. 75-2162 and 75-2163

LINDA CHAPMAN,

Plaintiff-Appellee and Cross-Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellant and Cross-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

No. 73-C-2881—Thomas R. McMillen, *Judge.*

Reheard *In Banc* October 19, 1977—Decided May 1, 1978

Before FAIRCHILD, *Chief Judge*, CASTLE, *Senior Circuit Judge*,
SWYGERT, CUMMINGS, PELL, SPRECHER, TONE, BAUER and
WOOD, *Circuit Judges.*

TONE, *Circuit Judge.* The issue on which this case turns, in the view of a majority of the court, is whether the federal admiralty jurisdiction extends to tort claims involving the operation of small pleasure boats over waters that, although navigable and used for commercial transportation in the past, are now used and likely to be used only for recreational activities. We hold that admiralty jurisdiction does not exist under these circumstances.

Murrell Chapman drowned in the Kankakee River when the small boat in which he was fishing swept over an unmarked submerged dam and capsized. His administrator sued the United States under the Suits in Admiralty Act, 46 U. S. C. § 741, *et seq.*, contending that it had a duty to mark the dam, and recovered a judgment for \$49,207 in a bench trial.

A panel of this court affirmed the judgment with minor modifications, 541 F. 2d 641 (1976), and confirmed that action in a later, revised version of the same opinion, which has not been published. We granted rehearing in banc and now reverse the judgment.

The dam in question lies between the left bank and an island at Wilmington, Illinois, where the river flows north. The United States did not build the dam and has never owned it, maintained it, marked it, or had any other connection with it.¹ The City of Wilmington now owns the dam. The island on which the east end of the dam abuts is a public recreational park. Prior to the accident the dam was marked by barrels placed by the Wilmington Rotary Club, but these markings were not there when the accident occurred. Since the accident, the dam has been marked by buoys placed by the Illinois Department of Conservancy.

The Kankakee River, which joins with the Des Plaines to form the Illinois River a few miles downstream from Wilmington, was not a part of the waterway connecting Lake Michigan and the Mississippi River via the Illinois-Michigan Canal.²

1. A statement in the initial panel opinion that the United States had participated in the erection of the dam, 541 F. 2d at 645, was deleted from the unpublished, revised panel opinion. A statement that "the United States was a procuring cause of the dam being constructed," 541 F. 2d at 646, was changed to "the United States was of major significance in the dam's construction." Our examination of the record convinces us that the facts are as we have stated in the text. Appellee does not argue to the contrary.

2. Nor was it a part of the early Chicago-Des Plaines-Illinois trading route described in *Economy Light & Power Co. v. United States*, 256 U. S. 113 (1921).

Running from the Chicago River to the Illinois River at LaSalle, Illinois, the 96-mile canal was built under the authority of the State of Illinois. The right of way for the canal and additional land to be sold to raise money for construction were granted by Congress to the state in the 1820's, but construction was not commenced until 1836; the canal was completed in 1848.³ It served as an artery of commerce for several decades but became obsolete long before the turn of the century and, according to the *Encyclopaedia Britannica*, has not been used since 1900.⁴ The present Illinois Waterway parallels the old canal.⁵

The only relationship the Kankakee River had with the Illinois-Michigan Canal was as a source of additional water. To collect the water and divert it to the canal, the state built a dam across the Kankakee a short distance below Wilmington and a feeder canal from that point to the Illinois-Michigan Canal.

There was once some commercial navigation on the Kankakee itself. In 1847 a private company was organized for the purpose of improving navigation and developing water power on that river. Pursuant to authority obtained from the state, the company proceeded to raise the state dam, built a lock in the feeder canal, and built four additional dams and locks, providing navigation for some distance above Wilmington. One of these four dams was the one involved in this case.

3. "Illinois and Michigan Canal" 5 *Encyclopaedia Britannica* 303 (1975); E. Dunne, Illinois, *The Heart of the Nation* 365-370 (1933).

4. See note 3, *supra*.

5. See *Encyclopaedia Britannica*, *supra*, note 3. The Illinois Waterway Strip Maps published by the U. S. Army Engineer District, Chicago, show the Illinois-Michigan Canal running roughly parallel with the Des Plaines and Illinois Rivers from the Des Plaines River at Brandon Road Lock and Dam in Joliet to LaSalle, but do not show the old canal north of that lock and dam. The Chicago Tribune Chicagoland Map, however, shows the old canal leaving the Des Plaines just south of the Old State Prison in Joliet and running parallel with the Chicago Sanitary and Ship Canal as far north as Archer Avenue in Chicago.

The Kankakee received some attention from Congress and some federal supervision. In 1878 and 1879 Congress appropriated money for study and improvements of the Kankakee.⁶ In 1915 money was appropriated for flood protection along the river, with the federal government's participation to be based on "the value of protection to navigation."⁷ At various times before 1931 Congress authorized construction across the Kankakee of bridges⁸ and another dam,⁹ and the Army Corps of Engineers issued permits authorizing installation of overhead wires and submarine cables across the river. In 1924 a power company filed with the Federal Power Commission a declaration of intent to build a dam and other works in the river, and the District Corps of Engineers recommended that the river be considered a navigable stream subject to the FPC's jurisdiction. During the same year the Secretary of War opposed a bill in Congress that would have declared the river to be non-navigable for some 27 miles, which would include the Wilmington section. Congress did not adopt the bill. In 1932, however, the Corps of Engineers, acting through its Division Engineer, determined that this part of the Kankakee was not navigable, although the Division Engineer's subordinate, the District Engineer, had made a contrary recommendation.

After 1931 at the latest, no commercial vessels of any kind used the Kankakee River, and the federal government exercised no supervisory authority over it. Since that time the river has been used solely for recreational purposes. It is not now usable for commercial shipping.

6. Act of June 18, 1878, ch. 264, 20 Stat. 162. A further appropriation was made for an examination and survey. Act of March 3, 1879, ch. 181, § 2, 20 Stat. 374.

7. Act of March 4, 1915, ch. 142, § 15, 38 Stat. 1060.

8. Act of Jan. 24, 1923, ch. 35, 42 Stat. 1171-2; Act of March 21, 1924, ch. 72, 43 Stat. 29; Act of Jan. 31, 1931, ch. 89, 46 Stat. 1058; Act of Feb. 29, 1932, ch. 60, 47 Stat. 58. The last three bridges were to be "suitable to the interests of navigation."

9. Act of Feb. 28, 1929, ch. 362, 45 Stat. 1345-6.

I.

In *Adams v. Montana Power Co.*, 528 F. 2d 437 (1975), the Ninth Circuit held that the admiralty jurisdiction did not extend to a tort claim arising in waters "traversed by small pleasure craft only," where "no commercial shipping occurred or was likely to occur," *id.* at 440, notwithstanding that the waters were navigable for purposes of Congress' exercise of its powers under the commerce clause, *id.* We agree with that opinion and adopt its reasoning, including the following passages:

The logic of requiring commercial activity is evident. The purpose behind the grant of admiralty jurisdiction was the protection and the promotion of the maritime shipping industry through the development and application, by neutral federal courts of a uniform and specialized body of federal law. . . . The strong federal interest in fostering commercial maritime activity outweighed the interest of any state in providing a forum and applying its own law to regulate conduct within its borders. It follows that admiralty jurisdiction need and should extend only to those waters traversed or susceptible of being traversed by commercial craft. In the absence of commercial activity, present or potential, there is no ascertainable federal interest justifying the frustration of legitimate state interests.

* * * * *

The damming of a previously navigable waterway by a state cannot divest Congress of its control over a potentially useful artery of commerce, since such obstructions may always be removed. Hence the courts have reasonably held that a navigable river is not rendered non-navigable by artificial obstruction.

However, if the damming of a waterway has the practical effect of eliminating commercial maritime activity, no federal interest is served by the exercise of admiralty jurisdiction over the events transpiring on that body of water, whether or not it was originally navigable. No purpose is served by application of a uniform body of federal law, on waters devoid of trade and commerce, to regulate the activities and resolve the disputes of pleasure boaters. . . .

[T]he burdening of federal courts and the frustrating of the purposes of state tort law would be thereby served.

Id. at 439, 440-441 (citations and footnotes omitted).

The *Adams* decision is consistent with *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U. S. 249 (1972). In each of these cases the holding that admiralty jurisdiction did not exist, in *Adams* over water unusable for commercial maritime activity and in *Executive Jet* over an aircraft accident unrelated to such activity although occurring in navigable waters was based on the same principle, viz., that the reason for the existence of admiralty jurisdiction is to protect and promote commercial maritime activity through the development of a uniform federal maritime law. The Court in *Executive Jet* expressly confined its holding to aviation torts, 409 U. S. at 268, 274, but its reasoning is nevertheless instructive. In reaching the conclusion that the alleged wrong did not "bear a significant relationship to traditional maritime activity," *id.* at 268, i.e., activity "involving navigation and commerce on navigable waters," *id.* at 272, the Court pointed to the inappropriateness of applying to aircraft crash cases the rules developed in admiralty for traditional maritime disputes, *id.* at 269-271, and observed that the state courts "could plainly exercise jurisdiction over the suit, and could plainly apply familiar concepts of [state] tort law without any effect on maritime endeavors." *Id.* at 273 (footnotes omitted). The same can be said of a claim arising out of a pleasure boat accident in waters used exclusively for recreational activities.¹⁰

10. The reach of admiralty jurisdiction over pleasure boat mishaps occurring in navigable waters used for commercial activity is, of course, not before us. The Supreme Court assumed without discussion in cases decided before *Executive Jet* that the operation of pleasure boats on such waters was within the admiralty jurisdiction. *Levinson v. Deupree*, 345 U. S. 648 (1953) (crash of two motorboats); *Coryell v. Phipps*, 317 U. S. 406 (1943) (fire on yacht damaging other craft in yacht storage basin); *Just v. Chambers*, 312 U. S. 383 (1941) (injury to passengers on yacht caused by carbon monoxide); see *Crosson v. Vance*, 484 F. 2d 840, 842 (4th Cir. 1973); *Richards v. Blake Builders Supply Inc.*, 528 F. 2d 745, 749 (4th Cir. 1975). In a variety of fact situations, other circuits have

(Footnote continued on next page.)

II.

The United States, as we have noted, has never had any connection with the dam in question. Even if it had, however, that would not give rise to admiralty jurisdiction, although jurisdiction and liability under the Federal Tort Claims Act might well exist. That Act is not invoked here.¹¹

The panel of this court that originally heard this appeal rested its holdings as to both admiralty jurisdiction and liability upon federal land grants for the creation of the waterway in the 1820's and federal supervision over the waterway through the 1920's. Thus the panel, while expressing agreement in principle with *Adams*, said that "the United States' interest in the project for a centry and the effort of the Corps of Engineers to abandon it unilaterally, without supervision or control, requires the exercise of jurisdiction and the placing of responsibility on the United States." 541 F. 2d at 643. In its revised opinion the panel retained the quoted language and also said, "[T]he evidence of the United States involvement in the Illinois-Michigan Canal project as well as supervisory functions cannot be denied."¹²

(Footnote continued from preceding page.)

reached the same result after *Executive Jet*. See *Kelly v. United States*, 531 F. 2d 1144, 1146-1147 (2d Cir. 1976) (action against Coast Guard for negligence in failing to rescue erstwhile passengers of capsized sailboat); *Richards v. Blake Builders Supply Inc.*, *supra*, 528 F. 2d at 745 (crash of motorboat against bank of stream); *Kelly v. Smith*, 485 F. 2d 520, 523-526 (5th Cir. 1973); *cert. denied*, 416 U. S. 969 (1974) (poachers in motorboat injured by rifle fire aimed at them by members of private hunting preserve on shore); see also *St. Hilaire Moye v. Henderson*, 496 F. 2d 973, 976-979 (8th Cir.), *cert. denied*, 419 U. S. 884 (1974) (injury to motorboat passenger resulting from improper operation of boat). But compare *Stoltz, Pleasure Boating and Admiralty: Erie at Sea*, 51 Cal. L. Rev. 661 (1963).

11. The District Court's finding of no liability because of plaintiff's contributory negligence on a count brought under that Act is not challenged on appeal. See 541 F. 2d at 642 and 643 n. 1.

12. This language replaced the statement in the earlier panel opinion, referred to in note 1, *supra*, that the United States had participated in the erection of the dam in question.

The United States' involvement in the Illinois-Michigan Canal consisted of land grants by Congress to the State of Illinois over a century and a half ago for the construction of a canal that not only has been unused by commercial traffic for generations but was part of a waterway that did not include the Kankakee River. The only relationship the Kankakee had to that waterway was as a source of water. The federal supervisory functions did relate to the Kankakee River itself, but they consisted only of Congress' authorization of the construction of bridges and another dam and the Corps of Engineers' authorization of power lines and submarine cables in or over the river, all prior to 1931.

In our opinion, these facts do not require or justify the exercise of admiralty jurisdiction. We can conceive of no reason for holding the *Adams* rule inapplicable if the waters have ever been used for commercial maritime activity and were accordingly once federally regulated. The Suits in Admiralty Act, under which this action was brought, does not support such a result; that act merely waives the sovereign immunity of the federal government, *i.e.*, it subjects the United States to a suit in admiralty in circumstances in which such a suit could be maintained in admiralty against a private person. 46 U. S. C. § 742. See *State of Maine v. United States*, 134 F. 2d 574 (1st Cir.) *cert. denied*, 319 U. S. 772 (1943); *cf. Romero v. International Terminal Operating Co.*, 358 U. S. 354 (1959); *Hart and Wechsler's The Federal Courts and The Federal System* 1329 (Bator, *et al.* ed. 1973). The Fifth Circuit's *Buffalo Bayou Transportation Co. v. United States*, 375 F. 2d 675 (1967), relied upon by appellee and cited by the panel, countenanced an action under that Act when another federal statute, the Wreck Act, 33 U. S. C. §§ 409, 415, imposed a maritime related duty on the United States or its agent (although holding that there was no liability on the facts shown); but it involved a commercial vessel on waters used for commercial navigation. *Indian Towing Co. v. United States*, 350 U. S. 61 (1955),

referred to by the panel in connection with the liability issue "as a first cousin to this case," did not involve the admiralty jurisdiction of the federal courts.

We hold that a recreational boating accident does not give rise to a claim within the admiralty jurisdiction when it occurs on waters that, although navigable for purposes of Congress' power under the commerce clause, *Economy Light & Power Co. v. United States*, *supra*, 256 U. S. at 118, *et seq.*, are not in fact used for commercial navigation and are not susceptible of such use in their present state.

We express no opinion on the issue of whether the United States has a duty to remove obstructions in waters used for traditional maritime purposes, decided favorably to the government by Judge Will in *Blanksten v. United States*, 236 F. Supp. 280 (N. D. Ill. 1964)¹³ (following *Thornton v. United States*, 236 F. Supp. 651 (S. D. Miss. 1964)), and addressed in the *Buffalo Bayou* case, *supra*, and *Lane v. United States*, 529 F. 2d 175 (4th Cir. 1975). We note that the panel decision no longer stands as a precedent on the duty issue, because the effect of granting the rehearing in banc was to vacate the panel opinions. See *O'Connor v. Donaldson*, 422 U. S. 563, 578 n. 12 (1975).

The judgment is reversed, and the case is remanded to the District Court with directions to dismiss the admiralty claim for want of jurisdiction. The judgment in favor of the United States on a second count, based on the Federal Tort Claims Act, 28 U. S. C. § 2671, *et seq.* has not been appealed and will stand.

CASTLE, *Senior Circuit Judge*, dissenting. The majority states that they "can conceive of no reason for holding the *Adams* rule inapplicable if the waters have ever been used for commercial maritime activity and were accordingly once federally regulated." (Maj. Op. page 8.) This broad rule permits the govern-

13. It appears from the opinion in *Blanksten* that the seawall was constructed upon "the bed of Lake Michigan" and was "erected in a navigable waterway." 236 F. Supp. at 281. Compare 541 F. 2d at 645 n. 2.

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ment to withdraw unilaterally and with impunity its supervision over dangerous objects which were placed in a waterway while those waters were "commercial" and under federal control. In this suit against the United States, the panel properly distinguished the *Adams* case and denied the federal government the jurisdictional shield it has now obtained. 541 F. 2d at 646. Regarding the liability issue, I remain convinced that the United States owed a duty to persons using the Kankakee River to mark the dam for the reasons stated in the revised opinion of the original panel. I respectfully dissent.

A11

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 9, 1978

Before

Hon. PHILIP W. TONE, *Circuit Judge*

LINDA CHAPMAN, <i>Plaintiff-Appellee and</i> <i>Cross-Appellant,</i>	}	Appeal from the United States Dis- trict Court for the Northern District of Illinois, Eastern Di- vision.
Nos. 75-2162 and vs. 75-2163		
UNITED STATES OF AMERICA, <i>Defendant-Appellant and</i> <i>Cross-Appellee.</i>		No. 73-C-2881 Thomas R. McMillen, <i>Judge.</i>

ORDER

On the court's own motion, on page 9, lines 29 and 30 from the top, of the opinion filed on May 1, 1978, the following is deleted:

"See *O'Connor v. Donaldson*, 422 U. S. 563, 578 n. 12 (1975)."

REVISED

IN THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit

Nos. 75-2162 and 75-2163

LINDA CHAPMAN,

Plaintiff-Appellee & Cross-Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellant & Cross-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

No. 73-C-2881—Thomas R. McMillen, *Judge.*

Argued May 25, 1976—Decided June 3, 1977

Before CLARK, *Associate Justice**, CASTLE, *Senior Circuit Judge*, and CAMPBELL, *Senior District Judge*.**

CLARK, *Associate Justice.* Linda Chapman, Administratrix of the Estate of Murrel Chapman, deceased, the appellee, recovered a judgment for \$49,207 00 against the United States of America, appellant, under the provisions of the Suits in Admiralty Act (46 U. S. C. § 741 *et seq.*), for the death of her husband, Murrel, when the small boat in which he was fishing was swept over a submerged dam in the Kankakee River. Initially, she included in her complaint an alternative count

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** Judge William J. Campbell, United States District Court for the Northern District of Illinois, is sitting by designation.

under the Federal Tort Claims Act (28 U. S. C. § 2671 *et seq.*), but the District Court dismissed the same, and no appeal was taken from that action. The United States contends that admiralty jurisdiction is not applicable because the Kankakee is not a navigable stream; and even if it is navigable that the United States did not own, construct, maintain or operate the dam and owed no duty, maritime or terrene, to mark it with a buoy or other type of marking. The District Court found to the contrary, and our examination of the record indicates that substantial evidence supports that finding and that the judgment must be sustained.

1. Nature of the Case:

Mr. Chapman and his sister-in-law, Debbie Paty, were fishing from a sixteen foot aluminum outboard motorboat in the west fork of the Kankakee River when the boat went over an unmarked submerged dam that ran all the way across this fork of the river some 985 feet from its east shore to Island Park on the west. Debbie was rescued a half mile downstream, but Murrel's body was not found for a week. Neither had lifebelts or other safety devices. The gravamen of the complaint was that the unmarked dam—not visible downstream—was a "menace and hindrance to navigation" and that the United States "negligently and wrongfully" caused, allowed and permitted the dam "to exist" and failed to warn boatmen of its "existence" and of "the swift and dangerous currents caused thereby." The case was tried to the court without a jury, and at the conclusion of the evidence the court found that the Kankakee River was "navigable at the point of the decedent's accident and is subject to the Admiralty Act," and it further found that "the decedent's activity was a maritime one and was covered by the Admiralty Act."

The court reasoned that the existence of the dam created a dangerous condition in navigable waters that was "almost invisible" to persons approaching it from upstream, that the United States had a duty to warn persons using the navigable waters of

this hidden hazard to navigation, and, having failed to do so, was liable for its failure to warn. See 14 U. S. C. § 86 and *Buffalo Bayou Transportation Co. v. United States*, 375 F. 2d 675 (5th Cir. 1967).¹ On the contributory negligence plea of the United States, the court found Chapman negligent by failing to keep a proper lookout; although warned in the past of the existence of the dam with its shore abutments clearly visible, he failed to take notice of it. On a subsequent hearing, the court found Chapman equally at fault, and on a comparative basis calculated the resulting damage to be \$49,207.00 which amount was awarded to the appellee.

2. Our Conclusions:

We have gone through all of the evidence, exhibits, etc., and find ample evidence to support the District Court's findings. However, we emphasize our agreement with Judge Weigel, in *Adams v. Montana Power Co.*, 528 F. 2d 437 (1975), that ordinarily in "the absence of commercial activity, present or potential, there is no ascertainable federal interest justifying the frustration of legitimate state interests." Here, however, as we shall point out *infra*, the United States' interest in the project for a century and the effort of the Corps of Engineers to abandon it unilaterally, without supervision or control, requires the exercise of jurisdiction and the placing of responsibility on the United States.

The Record here shows that as early as 1822, Congress passed an Act granting to the State of Illinois the right of way for the building of an Illinois-Michigan Canal tying Chicago to the Kankakee River. The State, being without funds for the construction of the canal, was the recipient of land granted by Congress in 1827. Sale of this land by the State raised the funds necessary for the construction of the canal, which was completed by 1848. In connection with this project, the State built a dam across the

1. Count II of the complaint was stricken by the Court on the ground that under the Tort Claims Act § 2680(a), negligence, which it found present, was a complete defense to appellee's claim.

Kankakee near Wilmington and a water feeder from that point to the canal, but the State made no provision for boats navigating the Kankakee to pass the State's dam. Subsequently in furtherance of the initial plan to improve navigation and to develop water power as well, a private concern known as the Kankakee Company raised the State dam two feet, built a lock at the end of that dam and constructed four additional locks and dams, one of which is the dam herein in question. These improvements provided an outlet for Kankakee Valley freight to go by water to Chicago and St. Louis. Boats were scheduled regularly from Custer Park to Chicago and St. Louis, generally weekly, carrying grain and other products and bringing back lumber, iron, coffee, sugar, salt, and many other articles. As late as 1879, the Kankakee River was found navigable, even during the low water season, for small light-draft vessels. By 1931 the steamers that had used the Kankakee for years had abandoned their schedules, but even as of that date a small side-wheel steamer was still operating.

The record also shows that as late as 1931 the Congress had authorized the construction of several bridges across the Kankakee; a number of other permits authorizing overhead wires, submarine cable, etc., were issued by the Corps of Engineers. Furthermore, a Declaration of Intention filed by the Public Service Company of Northern Illinois to construct a dam at Aroma Park and other works on the Kankakee was docketed with the Federal Power Commission on February 15, 1924. The District Engineer of the Corps of Engineers recommended that the Kankakee be considered a navigable stream, subject to the jurisdiction of the Federal Power Commission. The War Department concurred in this recommendation, but the application was denied. On March 22, 1924, Senate Bill 2904 was introduced declaring the Kankakee to be non-navigable for some 27 miles beginning at a point 5 miles from its mouth and the Aroma Park site where the dam was proposed. The Secretary of War vigorously opposed the legislation, advising the Congress, in part:

It thus appears that the river has been extensively improved by State and private agencies in the interest of navigation and for other purposes. *The enactment of the proposed Bill would remove this section of the river from the usual federal supervision.* Experience has shown that supervision of streams of minor importance even is likely to benefit both public and private interests by insuring the planning and execution of operations affecting them that the public interest will be conserved.

So far as is known the enactment of this Bill would benefit no public interest and is not necessary for any purpose. In view of the public use that has been made of the river in the past and which the State of Illinois is improving at large expense, it is my opinion that the passage of the Bill is not desirable and I recommend that it not be considered favorably. (Emphasis added).

The Bill was never enacted, and the Commission denied the application.

It appears that the District Engineer, Corps of Engineers, U. S. Army, having jurisdiction of the Kankakee River area, was influenced in his decision that the Kankakee was navigable by the decision of the Supreme Court in *Economy Light and Power Co. v. United States*, 256 U. S. 113 (1921), which involved the navigability of the Des Plaines River from Riverside, Illinois, to its mouth, which included rapids where the fall was 78 feet in ten miles. Above Lockport the low water flow was so small and the boulders in the stream so numerous that a person could cross the river by stepping from stone to stone and not get his feet wet. The Court held that a river was navigable in law even though it contains natural obstructions and though it be not open to navigation at all seasons or at all stages of water (p. 121). The federal authority over navigable streams in Illinois and neighboring states sprang, the Court held, from the compact in the Ordinance of July 13, 1787, Article 4, for the government of the territory northwest of the Ohio River, declaring all navigable waters leading into the Mississippi River to be "common highways." (The

Des Plaines and Kankakee join just below Joliet, Illinois, to form the Illinois River, which flows into the Mississippi.) It appears that the Kankakee River watershed is over four times as large as that of the Des Plaines; its minimum discharge ranges from 300 to 900 cubic feet per second and its mean annual flow is 4100 cubic feet per second; and it is some four times as large as the Des Plaines, with approximately four times its navigable capacity.

It is true that the finding of navigability of the Kankakee by the District Engineer in 1931 was contrary to that of the Division Engineer, dated March 8, 1932, made pursuant to a circular letter of the Chief of Engineers dated January 8, 1931, subject—Navigable Status of Waterways—United States. We note, however, that the Division Engineer found "no historical evidence to prove that the Kankakee River, in its natural state, ever constituted a route or highway for interstate commerce." On the contrary, both the District Engineer and the District Court found much evidence on this point. Moreover, the Division Engineer found the Des Plaines case "not applicable in determining the navigable status of the Kankakee River." Both the District Engineer and the District Court found the case controlling and we agree.

3. The Law of the Case:

As both the Supreme Court and the various Courts of Appeals have held again and again, the jurisdiction of the United States under the Admiralty Act is determined by whether a waterway is capable of being used for the purpose of commerce. *The Montello*, 87 U. S. 430, 441 (1874); *Economy Light and Power Co. v. United States*, *supra*. The evidence here shows that the Kankakee was used by fur traders, very much the same as the Des Plaines, long before the building of the dams by the State of Illinois and the Kankakee Company, all in furtherance of the navigability scheme developed with the approval and assistance of the Congress. This dam was built in order to divert some of

the water of one fork of the river into the canal and permit additional traffic on the Kankakee from Chicago, and vice versa, while handling freight from the Kankakee territory to the Chicago and St. Louis markets. Freight as well as steamers passed over the Kankakee well into the present century. As late as 1924, the Congress, the Secretary of War, the State of Illinois, and the Federal Power Commission recognized the Kankakee as a navigable stream. Indeed, the Secretary seems to have been the direct cause of the failure of the proposed legislation declaring the Kankakee non-navigable; and we note that his underlying ground was that the Kankakee should remain under the "usual federal supervision." With this wealth of evidence to the contrary, we cannot say that the District Court erred in not following the finding of the Division Engineer. After all, the latter's views, even though approved by the Chief Engineer, only represent the views of the Army Engineers, not those of the United States. Only Congress or the judiciary can determine such a question conclusively. The District Court heard the evidence and decided the issue, and in the light of the facts, we cannot say that it erred in deciding against the Engineers. Nor can we hold, as we have already said, that the Government's involvement in the project was so slight as to justify a refusal to exercise admiralty jurisdiction.

The United States emphasizes that it did not own, construct, maintain or in any way operate the dam involved here; nor did it ever undertake "a duty to mark the dam."² It begs the question posed here, i.e., did it owe the duty to mark the dam? The evidence of United States involvement in the Illinois-

2. It cites *Indian Towing Co. v. United States*, 350 U. S. 61 (1955), and *Blanksten v. United States*, 236 F. Supp. 281 (N. D. Ill. 1964), as supporting its position. However, *Indian Towing* stands for the proposition that, where the Government has gone into the business of erecting lighthouses, it must, after erecting one, properly maintain it. We might cite it as a first cousin to this case. In *Blanksten*, a small boat ran into a seawall which was built on land abutting navigable waters. The United States never asserted any jurisdiction over the seawall, had nothing to do with its erection, and it was not located in navigable waters as was the dam here.

Michigan Canal project as well as subsequent supervisory functions cannot be denied.

The Congress in 1822 granted the right of way for the canal which ultimately led to the building of the dams. Act of March 30, 1822, ch. 14, 3 Stat. 659. Congress made direct grants of land for the sole purpose of furnishing the means for Illinois to build the canal and its dam. Act of March 2, 1827, ch. 51, 4 Stat. 234. Thus both were built with the knowledge, consent and assistance of the United States. Likewise, the four locks and dams built by the Kankakee Company, at the instance of the State, were in furtherance of the original navigational plan and with the knowledge of the federal government. Indeed, Congress not only recognized but claimed a dominant servitude over the entire Kankakee in a number of ways. Money was appropriated for study and improvements. Act of June 18, 1878, ch. 264, 20 Stat. 162. A further appropriation was made for an examination and survey. Act of March 3, 1879, ch. 181, § 2, 20 Stat. 374. Monies were appropriated for flood protection, the federal share to be based upon the "value of protection to navigation." Act of March 4, 1915, ch. 142, 38 Stat. 1060. The construction of four bridges was authorized, the last three "suitable to the interest of navigation" to be built "in accordance with the provisions of the Act entitled 'An Act to regulate the construction of bridges over navigable waters.'" Act of Jan. 24, 1923, ch. 35, 42 Stat. 1171-2; Act of March 21, 1924, ch. 72, 43 Stat. 29; Act of Jan. 31, 1931, ch. 89, 46 Stat. 1058; Act of Feb. 29, 1932, ch. 60, 47 Stat. 58. In 1929, construction of a dam on the Kankakee was authorized as well. Act of Feb. 28, 1929, ch. 362, 45 Stat. 1345-6. Overhead wires, submarine cables and the like have also been authorized in recent years. And as mentioned *supra*, as late as 1924 the Federal Power Commission recognized its jurisdiction over the Kankakee as a navigable stream, as did the Army Engineers in acquiescing thereto. The Secretary of War claimed specific supervision over it, and Congress continued its dominant servitude by failing to

enact legislation declaring the Kankakee non-navigable in 1924. This aspect of the case—recognition by Congress of the Kankakee as navigable water—when coupled with the history of federal involvement whether by land grants or approval of construction permits is the death blow to the Government's case. We believe that in such a state of the record that jurisdiction would lie under the Suits in Admiralty Act, *Buffalo Bayou Transportation Co. v. United States*, *supra*, and that the failure of the United States to warn those using the Kankakee that this dangerous hazard existed, stated a cause of action thereunder.

As we have already indicated, we heartily agree that the "application of a uniform body of federal law, on waters devoid of trade and commerce, to regulate the activities and resolve the disputes of pleasure boaters," *Adams v. Montana Power Co.*, *supra* at 440, not only does not make sense, but "frustrates the purpose of state tort law . . ." *Id.* at 441. However, here the activity of the United States was of major significance in the dam's construction and has let it become submerged under the surface water, becoming a hazard to the safety of all who approach it. As late as 1932, the United States evidenced a continuing right of supervision over the Kankakee, at which point in time it claimed by means of an inter-office memorandum that it could escape all further responsibility. Now the Kankakee at the point of the dam has become a resort for fishermen, picnickers, sailors, bathers, water-skiers, and sightseers, which from a safety standpoint requires even greater supervision. The United States has, *ex parte*, renounced the supervision it had claimed for a century and has not only permitted the dam to deteriorate into a number one water hazard but has not even placed warning signs to alert the public to the dangers that it has helped to create. This seems to us both untenable and unseemly. As we have been granted admiralty jurisdiction over maritime activity, it is imperative that that jurisdiction be exercised here.

Appellee, as cross-appellant, urges that the \$2,000 income tax computed and deducted on annual earnings should be forgiven under *Cox v. Northwest Airlines, Inc.*, 379 F. 2d 893 (7th Cir. 1967), because of the size of the income, the fact that it is based on 1968 dollars whose subsequent erosion has stripped them of much power in the market place, as well as the failure to award attorney fees. There is much equity in this claim, and we therefore strike out the deduction of income tax and increase the net annual earnings to \$10,467.00, which in accumulation will make the total recovery \$56,875.00 and judgment is awarded in this amount; otherwise, the decision of the District Court is

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Nos. 75-2162 and 75-2163

LINDA CHAPMAN,

Plaintiff-Appellee & Cross-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant & Cross-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois
Eastern Division—No. 73-C-2881

THOMAS R. McMILLEN, *Judge.*

Argued May 25, 1976—Decided August 20, 1976

Before CLARK, *Associate Justice**, CASTLE, *Senior Circuit Judge*, and CAMPBELL, *Senior District Judge.***

CLARK, *Associate Justice.* Linda Chapman, Administratrix of the Estate of Murrel Chapman, deceased, the appellee, recovered a judgment for \$49,207.00 against the United States of America, appellant, under the provisions of the Suits in Admiralty Act (46 U. S. C. § 741 et seq.), for the death of her husband, Murrel, when the small boat in which he was fishing

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was swept over a submerged dam in the Kankakee River. Initially, she included in her complaint an alternative count under the Federal Tort Claims Act (28 U. S. C. § 2671 et seq.), but the District Court dismissed the same and no appeal was taken from that action. The United States contends that admiralty jurisdiction is not applicable because the Kankakee is not a navigable stream; and even if it is navigable that the United States did not own, construct, maintain or operate the dam and owed no duty, maritime or terrene, to mark it with a buoy or other type of marking. The District Court found to the contrary, and our examination of the record indicates that substantial evidence supports that finding and that the judgment must therefore be sustained.

1. Nature of the Case:

Mr. Chapman and his sister-in-law, Debbie Paty, were fishing from a sixteen foot aluminum outboard motorboat in the west fork of the Kankakee River when the boat went over an unmarked submerged dam that ran all the way across this fork of the river some 985 feet from its east shore to Island Park on the west. Debbie was rescued a half mile downstream, but Murrel's body was not found for a week. Neither had lifebelts or other safety devices. The gravamen of the complaint was that the unmarked dam—not visible downstream—was a "menace and hindrance to navigation" and the United States "negligently and wrongfully" caused, allowed and permitted the dam "to exist" and failed to warn boatmen of its "existence" and of "the swift and dangerous currents caused thereby." The case was tried to the court without a jury, and at the conclusion of the evidence the court found that the Kankakee River was "navigable at the point of the decedent's accident and is subject to the Admiralty Act", and it further found that "the decedent's activity was a maritime one and was covered by the Admiralty Act."

The court reasoned that the existence of the dam created a dangerous condition in navigable waters that was "almost

invisible" to persons approaching it from upstream, that the United States had a duty to warn persons using the navigable waters of this hidden hazard to navigation, and, having failed to do so, was liable for its failure to warn. See 14 U. S. C. § 86 and *Buffalo Bayou Transportation Co. v. United States*, 375 F. 2d 675 (5th Cir. 1967).¹ On the contributory negligence plea of the United States, the court found Chapman negligent by failing to keep a proper lookout; although warned in the past of the existence of the dam with its shore abutments clearly visible, he failed to take notice of it. On a subsequent hearing, the court found Chapman equally at fault, and on a comparative basis calculated the resulting damage to be \$49,207.00, which amount was awarded to the appellee.

2. Our Conclusions:

We have gone through all of the evidence, exhibits, etc., and find ample evidence to support the District Court's findings. However, we emphasize our agreement with Judge Weigel, in *Adams v. Montana Power Company*, 528 F. 2d 437 (1975) that ordinarily in "the absence of commercial activity, present or potential, there is no ascertainable federal interest justifying the frustration of legitimate state interests." Here, however, as we shall point out *infra*, the United States' interest in the project for a centry and the effort of the Corps of Engineers to abandon it unilaterally, without supervision or control, requires the exercise of jurisdiction and the placing of responsibility on the United States.

The Record here shows that as early as 1822, Congress passed an Act granting to the State of Illinois the right of way for the building of an Illinois-Natchez Canal tying Chicago to the Kankakee River. The State, being without funds for construction of the canal, was the recipient of land granted by

1. Count II of the complaint was stricken by the Court on the ground that under the Tort Claims Act § 2630(a), negligence, which it found present, was a complete defense to appellee's claim.

Congress in 1827. Sale of this land by the State raised the funds necessary for construction. The canal was completed by 1848. In connection with this project, the State built a dam across the Kankakee River near Wilmington, and constructed a water feeder from that point to the canal, but the State made no provision for boats navigating the Kankakee river to pass the State's dam. A private company subsequently raised the dam two feet and constructed additional locks and dams in the Kankakee above that point. These improvements provided an outlet for Kankakee Valley freight to go by water to Chicago and St. Louis. Boats were scheduled regularly from Custer Park to Chicago and St. Louis, generally weekly, carrying grain and other products and brought back lumber, iron, coffee, sugar, salt, and many other articles. As late as 1879, the Kankakee River was found navigable, even during the low water season, for small light-draft vessels. By 1931 the steamers that had used the Kankakee for years had abandoned their schedules, but even as of that date, a small side-wheel steamer was still operating.

The record also shows that as late as 1931, the Congress had authorized the construction of several bridges across the Kankakee; a number of other permits authorizing overhead wires, submarine cable, etc., were issued by the Corps of Engineers. Furthermore, a Declaration of Intention filed by the Public Service Company of Northern Illinois to construct a dam at Aroma Park and other works on the Kankakee was docketed with the Federal Power Commission on February 15, 1924. The District Engineer of the Corps of Engineers recommended that the Kankakee be considered a navigable stream, subject to the jurisdiction of the Federal Power Commission. The War Department concurred in this recommendation, but the application was denied. On March 22, 1924, Senate Bill 2904 was introduced declaring the Kankakee to be non-navigable for some 27 miles beginning at a point 5 miles from its mouth and the Aroma Park site where the dam was proposed. The Secretary of War vigorously opposed the legislation, advising the Congress, in part:

It thus appears that the river has been extensively improved by State and private agencies in the interest of navigation and for other purposes. The enactment of the proposed Bill would remove this section of the river from the usual federal supervision. Experience has shown that supervision of streams of minor importance even is likely to benefit both public and private interests by insuring the planning and execution of operations affecting them that the public interest will be conserved.

So far as is known the enactment of this Bill would benefit no public interest and is not necessary for any purpose. In view of the public use that has been made of the river in the past and which the State of Illinois is improving at large expense, it is my opinion that the passage of the Bill is not desirable and I recommend that it not be considered favorably.

The Bill was never enacted, and the Commission denied the application.

It appears that the District Engineer, Corps of Engineers, U. S. Army, having jurisdiction of the Kankakee River area, was influenced in his decision that the Kankakee was navigable by the decision of the Supreme Court in *Economy Light and Power Company v. United States*, 256 U. S. 113 (1921), which involved the navigability of the Des Plaines River from Riverside, Illinois, to its mouth, which included rapids where the fall was 78 feet in ten miles. Above Lockport the low water flow was so small and the boulders in the stream so numerous that a person could cross the river by stepping from stone to stone and not get his feet wet. The Court held that a river was navigable in law even though it contains natural obstructions and though it be not open to navigation at all seasons or at all stages of water (p. 121). The federal authority over navigable streams in Illinois and neighboring states sprang, the Court held, from the compact in the Ordinance of July 13, 1787, Article 4, for the government of the territory northwest of the Ohio River, declaring all navigable waters leading into the Mississippi River to be

"common highways." (The Des Plaines and Kankakee join just below Joliet, Illinois, to form the Illinois River which flows into the Mississippi). It appears that the Kankakee River watershed is over four times as large as that of the Des Plaines; its minimum discharge ranges from 300 to 900 cubic feet per second and its mean annual flow is 4100 cubic feet per second; and it is some four times as large as the Des Plaines, with approximately four times its navigable capacity.

It is true that the finding of navigability of the Kankakee by the District Engineer in 1931 was contrary to that of the Division Engineer, dated March 8, 1932, made pursuant to a circular letter of the Chief of Engineers dated January 8, 1931, subject—Navigable Status of Waterways—United States. We note, however, that the Division Engineer found "no historical evidence to prove that the Kankakee River, in its natural state, ever constituted a route or highway for interstate commerce." On the contrary, both the District Engineer and the District Court found much evidence on this point. Moreover, the Division Engineer found the Des Plaines case "not applicable in determining the navigable status of the Kankakee River." Both the District Engineer and the District Court found the case controlling and we agree.

3. The Law of the Case:

As both the Supreme Court and the various Courts of Appeals have held again and again, the jurisdiction of the United States under the Admiralty Act is determined by whether a waterway is capable of being used for the purposes of commerce. *The Montello*, 87 U. S. 430, 441 (1874); *Economy Light and Power Co. v. United States*, *supra*. The evidence here shows that the Kankakee was used by fur traders, very much the same as the Des Plaines, long before the building of the dam by Illinois with the approval and assistance of the Congress. This dam was built in order to divert some of the water of one fork of the river into the canal and permit additional traffic on the

Kankakee from Chicago, and vice versa, while handling freight from the Kankakee territory to the Chicago and St. Louis markets. Freight as well as steamers passed over the Kankakee well into the present century. As late as 1924, the Congress, the Secretary of War, the State of Illinois, and the Federal Power Commission recognized the Kankakee as a navigable stream. Indeed, the Secretary seems to have been the direct cause of the failure of the proposed legislation declaring the Kankakee non-navigable; and we note that his underlying ground was that the Kankakee should remain under the "usual federal supervision". With this wealth of evidence to the contrary, we cannot say that the District Court erred in not following the finding of the Division Engineer. After all, the latter's views, even though approved by the Chief Engineer, only represent the views of the Army Engineers, not those of the United States. Only Congress or the judiciary can determine such a question conclusively. The District Court heard the evidence and decided the issue, and in the light of the facts, we cannot say that it erred in deciding against the Engineers. Nor can we hold, as we have already said, that the Government's involvement in the project was so slight as to justify a refusal to exercise admiralty jurisdiction.

The United States emphasizes that it did not own, construct, maintain or in any way operate the dam involved here; nor did it ever undertake "a duty to mark the dam."² It begs the question posed here, i.e., did it owe the duty to mark the dam? The evidence cannot be denied that the United States actively participated in the erection of the dam: The Congress in 1927

2. It cites *Indian Towing Company v. United States*, 350 U. S. 61 (1955) and *Blanksten v. United States*, 236 F. Supp. 281 (N. D. Ill. 1964), as supporting its position. However, *Indian Towing* stands for the proposition that where the Government has gone into the business of erecting lighthouses, it must, after erecting one, properly maintain it. We might cite it as a first cousin to this case. In *Blanksten*, a small boat ran into a seawall which was built on land abutting navigable waters. The United States never asserted any jurisdiction over the seawall, had nothing to do with its erection, and it was not located in navigable waters as was the dam here.

granted the right of way for the canal that led to the building of the dam; it made direct grants of land for the sole purpose of furnishing the means for Illinois to build the canal and the dam; both were built with the knowledge, consent, and assistance of the United States; Congress not only recognized but claimed a dominant servitude over the Kankakee by taking such actions; and, in addition, the United States further recognized its dominant power over the Kankakee by granting bridge privileges at other points along the river, as well as overhead wires, submarine cables, etc.; and as late as 1924 the Federal Power Commission recognized its jurisdiction over the Kankakee as a navigable stream, as did the Army Engineers in acquiescing thereto, and the Secretary of War claimed specific supervision over it; finally, Congress acquiesced by failing to enact proposed legislation declaring the Kankakee non-navigable. We believe that in such a state of the record that jurisdiction would lie under the Suits in Admiralty Act, *Buffalo Bayou Transportation Company v. United States*, 375 F. 2d 675 (1967) and that the failure of the United States to warn those using the Kankakee that this dangerous hazard existed, stated a cause of action thereunder.

As we have already indicated, we heartily agree that the "application of a uniform body of federal law, on waters devoid of trade and commerce, to regulate the activities and resolve the disputes of pleasure boaters" *Adams v. Montana Power Co.*, *supra*, at 440, not only does not make sense, but "frustrates the purposes of state tort law . . ." *Id.*, at 441. However, here the United States was a procuring cause of the dam being constructed and has let it become submerged under the surface water, becoming a hazard to the safety of all who approach it. As late as 1932, the United States has evidenced a continuing right of supervision over the Kankakee, at which point in time it claimed by means of an inter-office memorandum that it could escape all further responsibility. Now the Kankakee at the point of the dam has become a resort for fishermen, picnickers, sailors,

bathers, water-skiers, and sightseers, which from a safety standpoint requires even greater supervision. The United States has, *ex parte*, renounced the supervision it had claimed for a century and has not only permitted the dam to deteriorate into a number one water hazard but has not even placed warnings signs to alert the public to the dangers that it has helped to create. This seems to us both untenable and unseemly. As we have been granted admiralty jurisdiction over maritime activity, it is imperative that that jurisdiction be exercised here.

Appellee, as cross appellant, urges that the \$2000 income tax computed and deducted on annual earnings should be forgiven under *Cox v. Northwest Airlines, Inc.*, 379 F. 2d 893 (7th Cir. 1967) because of the size of the income, the fact that it is based on 1968 dollars whose subsequent erosion has stripped them of much power in the market place, as well as the failure to award attorney fees. There is much equity in this claim, and we therefore strike out the deduction of income tax and increase the net annual earnings to \$10,467.00, which in accumulation will make the total recovery \$56,875.00 and judgment is awarded in this amount; otherwise, the decision of the District Court is

AFFIRMED.

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

LINDA CHAPMAN, Administrator of the
Estate of Murrel E. Chapman, De-
ceased, *Plaintiff,*

vs.

UNITED STATES OF AMERICA,
Defendant.

No. 73 C 2881

DECISION ON LIABILITY

This case came on to be tried by the court on the issue of the defendant's liability. Plaintiff is the administratrix of the estate of her deceased husband who was drowned when his fishing boat went over a dam in the Kankakee River at Wilmington, Illinois. The complaint is stated in two counts, the first under the Admiralty Act, 46 U. S. C. § 741 and the second under the Federal Torts Claims Act, 28 U. S. C. § 2671 et seq. The court has heard the evidence on the issue of liability and has considered the documents which were admitted into evidence and the post-hearing memoranda filed by the parties. Thereon we make the following findings and conclusions:

1. The jurisdiction of the Federal Government under the Admiralty Act is determined by whether or not a waterway is capable of being used for purposes of commerce. It does not matter what type of commerce can be conducted or what natural obstructions are presented. *The Montello*, 87 U. S. 430, 441 (1874). Such activities as floating of logs and Colonial trade by fur merchants make a river navigable. *Wisconsin Public Service Corp. v. Federal Power Commission*, 147 F. 2d 743, 745 (7th Cir. 1945), c.d. 325 U. S. 880 (1944). Furthermore, once a

waterway is in fact navigable, it normally remains so. *United States v. Appalachian Power Co.*, 311 U. S. 377, 408 (1940); *Economy Light & Power Co. v. United States*, 256 U. S. 113, 123 (1921).

The plaintiff's evidence shows that the Kankakee River was used by fur traders and subsequently by freight boats and other forms of navigation as recently as 1882 (Plaintiff Ex. 27). The Federal government has authorized bridges and utility lines to cross in such a way that the river could be used for commercial purposes (Plaintiff Ex. 26a). Furthermore, a bill was introduced in the United States Senate in 1924 to declare the river non-navigable but it failed to pass after the Secretary of War recommended against it (Plaintiff Ex. 25). The fact that the Corps of Engineers once determined that the river was non-navigable at Wilmington is a contrary administrative decision, but it is not conclusive. See *United States v. United States Steel Corp.*, 482 F. 2d 439, 452-453 (7th Cir. 1973). The question of navigability must be determined by the objective facts, not by the opinion of the Corps of Engineers or of the Secretary of War.

The decision in *Economy Light & Power Co. v. United States*, supra, involved the Des Plaines River which is shorter and drains less area than the Kankakee River. The Des Plaines and the Kankakee Rivers join at a point about five miles downstream from Wilmington to form the Illinois River. The court found that the Des Plaines River was navigable, by virtue of fur trading and subsequent activities, but had fallen into disuse in this respect for a period of 100 years. We believe the same result must pertain to the Kankakee River for much of the same reasons as were stated by the Supreme Court with respect to the comparable Des Plaines River. We find and conclude that the Kankakee River was navigable at the point of the decedent's accident and is subject to the Admiralty Act.

2. We also find and conclude that the decedent's activity was a maritime one and is thus covered by the Admiralty Act. He and his sister-in-law were fishing from his boat when it drifted

over the dam. Boating is a traditional and typical maritime activity, not the incidental non-maritime activity which is excluded by such cases as *Executive Jet Aviation Inc. v. City of Cleveland*, 409 U. S. 249 (1972).

The fact that the decedent's activity was not commercial does not exempt this complaint from the Admiralty Act. The cases which do exclude certain activities, similarly to *Executive Jet*, involve such things as water-skiing and swimming. e.g. *Crosson v. Vance*, 484 F. 2d 840 (4th Cir. 1973).

3. The government contends that Count II is excluded from the Federal Tort Claims Act by 28 U. S. C. § 2680(a) which provides that this statute does not apply to:

Any claims . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

The plaintiff's theory is that the defendant should have removed this dam or should have provided warnings to prevent persons from unknowingly approaching the dam. We find and conclude that the removal of the Wilmington dam is a discretionary act which the Government could or could not perform, as it saw fit. In the case of *Buffalo Bayou Transportation Co. v. United States*, 375 F. 2d 675 (5th Cir. 1967), the court found that the removal of wreckage which obstructed a waterway was a discretionary act, as was the decision to dredge a waterway in *Boston Edison Co. v. Great Lakes Dredge & Dock Co.*, 423 F. 2d 891, 896 (1st Cir. 1970). Since the defendant did not erect the dam or even exercise any control over it, the case at bar is not similar to *Indian Towing Co. Inc. v. United States*, 350 U. S. 61 (1955) where the Federal government had erected a lighthouse but had failed to properly maintain it, causing the accident. See also *Spillway Marina Inc. v. United States*, 445 F. 2d 876, 878 (10th Cir. 1971).

However, the dam created a dangerous condition in navigable waters, since it was almost invisible to persons approaching it from upstream. The Federal government, including the Corps of Engineers, had a duty to warn persons involved in maritime activities of this condition, under *Buffalo Bayou Transportation Co.*, supra. Since it failed to recognize or perform this duty, it can be liable for the failure to act.

4. Defendant has pleaded the affirmative defense that the decedent's death was caused by his own negligence. We agree that the decedent was negligent to a certain extent, by failing to keep a proper look-out in operating his boat and by failing to heed the presence of the dam which he knew or should have known existed. He apparently did not realize, until too late, how close his boat had drifted toward the dam, although he had been warned about the dam in the past (Kyle deposition 29) and its on-shore abutments were clearly visible from the water (Plaintiff Ex. 6). However, we do not believe that his failure to equip himself or his boat with life preservers was the contributing cause of his death, since there is no evidence that he died from drowning. Nor can we find that he was negligent in failing to maintain his outboard motor in such a way that it could be promptly started when he did observe the dam, since evidence on the question is lacking.

Although this case has not been concluded on the issue of the measure of damages, we assume that contributory negligence is not a complete defense under the Admiralty Act. *Pope & Talbot Inc. v. Hawk*, 346 U. S. 406, 409 (1953); *United States v. Reliable Transfer Inc.*, ____ U. S. ____, 43 U. S. L. W. 4610, 4613 (1975). Under the Federal Tort Claims Act, however, contributory negligence is a complete defense and precludes any recovery on Count II.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment for liability is entered in favor of the plaintiff on Count I and in favor of the defendant on Count II.

This case will be called for a report on status and to be set for further proceedings if necessary on Friday, August 1, 1975 at 10:00 a.m.

Enter:

/s/ THOMAS R. McMILLEN
Judge, U. S. District Court

Dated: July 28, 1975

No. 78-108

Supreme Court, U. S.

FILED

SEP 15 1978

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

LINDA CHAPMAN, Administrator of the Estate of
MURRELL CHAPMAN, Deceased, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the court of appeals *en banc* (Pet. App. A1-A11) is reported at 575 F.2d 147. The initial opinion of a panel of the court of appeals (Pet. App. A22-A30) is reported at 541 F.2d 641, but the revised panel opinion (Pet. App. A12-A21) is unreported. The opinion of the district court on motion for reconsideration is unreported. The original opin-

(1)

ion of the district court (Pet. App. A31-A35) is likewise unreported.

JURISDICTION

The initial judgment of the court of appeals was entered on August 20, 1976, and its revised judgment was entered on June 3, 1977. The judgment of the court of appeals *en banc* was entered on May 1, 1978, and was modified on June 9, 1978. The petition for a writ of certiorari was filed on July 19, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether admiralty jurisdiction extends to a recreational boating accident occurring on waters that, although navigable for purposes of Congress' power under the Commerce Clause, are not now in fact used for commercial navigation, are not susceptible of such use in their present state, and are likely to be used only for recreational activities.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article III, Section 2, of the Constitution provides in part:

The judicial Power shall extend * * * to all Cases * * * of admiralty and maritime jurisdiction.

2. 28 U.S.C. 1333, provides in part:

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil cases of admiralty or maritime jurisdiction * * *.

3. 46 U.S.C. 742, provides in part:

In cases where if such vessel were privately owned or operated, * * * or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States * * *

4. 28 U.S.C. 1346(b), provides in part:

* * * the district courts, * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for * * * personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

STATEMENT

1. Murrell Chapman drowned in the Kankakee River at Wilmington, Illinois, when the 16 foot outboard motorboat in which he was fishing swept over an unmarked sill dam and capsized. His administrator sued the United States under the Suits in Admiralty Act, 41 Stat. 525-528, 46 U.S.C. 741-752, and the Federal Tort Claims Act, 28 U.S.C. 1346, 2671-2680, contending that it had a duty to mark the dam (Pet. App. A2).

The dam involved ("Wilmington Dam") lies between the left bank and an island at Wilmington, Illinois, where the river flows north. The United States did not build the dam and has never owned it, maintained it, marked it, or had any other connection with it. The City of Wilmington now owns the dam. The island on which the east end of the dam abuts is a public recreational park. Prior to the accident the dam was marked by barrels placed by the Wilmington Rotary Club, but these markings were not there when the accident occurred. Since the accident, the dam has been marked by buoys placed by the Illinois Department of Conservancy (Pet. App. A2).

The Kankakee River, which joins with the Des Plaines to form the Illinois River a few miles downstream from Wilmington, was not a part of the waterway connecting Lake Michigan and the Mississippi River via the Illinois-Michigan Canal. Running from the Chicago River to the Illinois River at La-Salle, Illinois, the 96-mile canal was built under the authority of the State of Illinois. The right of way for the canal and additional land to be sold to raise money for construction were granted by Congress to the State in the 1820's, but construction was not commenced until 1836; the canal was completed in 1848. It served as an artery of commerce for several decades but became obsolete long before the turn of the century and, according to the Encyclopedia Britannica, has not been used since 1900. The present Illinois Waterway parallels the old canal (*id.* at A2-A3).

The only relationship the Kankakee River had with the Illinois-Michigan Canal was as a source of additional water. To collect the water and divert it to the canal, the State built a dam across the Kankakee a short distance below Wilmington and a feeder canal from that point to the Illinois-Michigan Canal (Pet. App. A3).

There was once some commercial navigation on the Kankakee itself. In 1847 a private company was organized for the purpose of improving navigation and developing water power on that river. Pursuant to authority obtained from the State, that company raised the state dam, built a lock in the feeder canal, and built four additional dams and locks, providing navigation for some distance above Wilmington. One of these four dams was the dam involved in this case (*id.* at A3).

In 1878 and 1879 Congress appropriated money for study and improvements of the Kankakee. In 1915 money was appropriated for flood protection along the river, with the federal government's participation to be based on "the value of protection to navigation." At various times before 1931 Congress authorized construction across the Kankakee of bridges and another dam, and the Army Corps of Engineers issued permits authorizing installation of overhead wires and submarine cables across the river. In 1924 a power company filed with the Federal Power Commission a declaration of intent to build a dam and other works in the river, and the District Corps of Engineers recommended that the river be considered a navigable stream subject to the FPC's jurisdiction.

During the same year the Secretary of War opposed a bill in Congress that would have declared the river to be non-navigable for some 27 miles (which would have included the Wilmington section). Congress did not adopt the bill. In 1932, however, the Army Corps of Engineers, acting through its Division Engineer and the Chief of Engineers, determined that this part of the Kankakee was not navigable, although the Division Engineer's subordinate, the District Engineer, had made a contrary recommendation (Pet. App. A4).

After 1931, at the latest, no commercial vessels of any kind used the Kankakee River, and the federal government exercised no regulatory authority over it. Since that time the river has been used solely for recreational purposes. It is not now usable for commercial shipping (Pet. App. A4).

2. The district court dismissed plaintiff's Federal Tort Claims Act claim because of contributory negligence, but found that the Corps, although it had acted in good faith and had no notice of the hazard, was liable under the Suits In Admiralty Act for failing to mark the Wilmington Dam, pursuant to *Buffalo Bayou Transportation Co. v. United States*, 375 F.2d 675 (C.A. 5) (Pet. App. A34). A motion for reconsideration invoking, among other issues, the decision in *Adams v. Montana Power Co.*, 528 F.2d 437 (C.A. 9), was denied.

A panel of the court of appeals affirmed on the basis that the United States had granted land for construction of the Illinois & Michigan Canal and granted land for building of the dam in question

(Pet. App. A29). The panel granted rehearing when it was pointed out that the court was referring to the wrong dam. Although the opinion was corrected (Pet. App. A15), the court again affirmed.

On rehearing *en banc* the court of appeals completely reviewed the matter. The full court concluded that the United States' granting of land for the construction of the Illinois & Michigan Canal was not a basis of liability and appellee's counsel did not argue otherwise (Pet. App. A2 and n. 1). The court also decided that admiralty jurisdiction did not apply on waters that were navigable for Commerce Clause purposes but which were not in fact used for commercial navigation and were not susceptible of such use in their present state (Pet. App. A9).

ARGUMENT

1. Petitioner asks this Court to grant a writ of certiorari to "resolve the conflicts and review the scope of the Federal Admiralty Jurisdiction over pleasure boating activity" (Pet. 8). But that general question was not decided below and the present case is not an appropriate vehicle for its consideration by this Court.

What the court of appeals *en banc* held was that (Pet. App. A9):

* * * a recreational boating accident does not give rise to a claim within the admiralty jurisdiction *when it occurs on waters that, although navigable for purposes of Congress' power under the commerce clause, * * * are not in fact used*

for commercial navigation and are not susceptible of such use in their present state [emphasis added].

Indeed, the court *en banc* expressly noted that (Pet. App. A6, n. 10):

the reach of admiralty jurisdiction over pleasure boat mishaps occurring in navigable waters used for commercial activity is, of course, not before use.¹

There is, accordingly, no conflict between the present decision and the cases cited by petitioner, all of which involved the operation of pleasure boats as a traditional maritime activity on waters used for commercial navigation.² The instant case merely fol-

¹ Likewise, the court of appeals in *Adams v. Montana Power Company*, 528 F.2d 437 n. 4, 440-441 (C.A. 9), noted that:

Where commerce moves and the waters are legally navigable, there may be a federal interest in extending admiralty jurisdiction to pleasure craft. See *St. Hilaire Moye v. Henderson*, 496 F.2d 973 (8th Cir. 1974).

² See *Kelly v. Smith*, 485 F.2d 520, 526 (C.A. 5) (rifle fire directed at a vessel "on a major commercial artery"); *Lane v. United States*, 529 F.2d 175 (C.A. 4) (navigable waters abutting intercoastal waterway that supported commercial activity); *St. Hilaire Moye v. Henderson*, 496 F.2d 973 (C.A. 8) (boating accident on Arkansas River, which supported commercial activity); *Richards v. Blake Builders Supply Inc.*, 528 F.2d 745, 747 (C.A. 4) (Lake Gaston had some commercial activity).

So, also, the cases in this Court all involved activities on waters used for commercial purposes: *Levinson v. Deupree*, 345 U.S. 648 (crash of two motorboats on Ohio River); *Coryell v. Phipps*, 317 U.S. 406 (fire on yacht afloat in commercial storage basin); and *Just v. Chambers*, 312 U.S. 383 (injury to persons on yacht while cruising off Miami, Florida).

lows *Adams, supra*, in holding that admiralty jurisdiction is lacking because the waters had become state recreational resources which were not in fact used for commercial navigation and were not susceptible of such use in their present state.

2. Assuming *arguendo* the correctness of the rule just stated, petitioner nevertheless asserts that the "unique factual situation" presented here justifies a special exception (Pet. 9). But there is no basis for that result.

Petitioner invokes the original panel opinion to the effect that the United States was a "procuring cause of the dam being constructed." That, however, was a factual misstatement. As already noted, the panel itself revised this language on rehearing, when it was pointed out that the opinion had referred to the wrong dam. What is more, the full court expressly addressed this claim and concluded that it was not supported by an examination of the record. The court went on to note that "appellee does not argue to the contrary" (Pet. App. A2). In short, the United States had nothing to do with the Wilmington Dam.³

³ Petitioner also has a suit pending in the Illinois state courts against the City of Wilmington, the owner of the dam involved in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

SEPTEMBER 1978.